Supreme Court, U.
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MICHAEL RODAK, JR.,

80-344

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

QUINAULT PACIFIC CORPORATION,
INTERNATIONAL PAPER COMPANY,
WHITE LUMBER SALES, INC., and
GOLD REY FOREST PRODUCTS, INC., Petitioners,

versus

AETNA BUSINESS CREDIT, INC.
and JOHN C. PENNINGTON, TRUSTEE, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION

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QUESTIONS EVOKING THE SUPERVISORY POWER

1. *Whether* a reasonable federal judge *would have a doubt* about the parameters of judicial behavior under Art. III, Fifth Amendment Due Process, Code of Judicial Conduct for United States Judges, and 28 U.S.C.A. Sec. 455, *after reading the five published decisions of the court of appeals in which* a first panel held that "[t]he occurrence of *ex parte* conferences . . . alone do not demonstrate collusion," 581 F.2d 520, 521, but then vacated the decision "[b]ecause of the allegations of judicial misconduct contained in the petition for rehearing . . . ;" *and in which* a second panel enumerated allegations of *ex parte* discussions between a judge and adversary parties regarding orders and opinions the latter had been secretly delegated to prepare, 607 F.2d 117 (second paragraph, second sentence), but then vacated the decision without explanation, 613 F.2d 117, upon a second FRAP 40(a) rehearing petition that "state[d] with particularity the point of law or fact . . . the court ha[d] overlooked or misapprehended . . . ;" *and in which* a third panel "reinstate[d]" the vacated opinion and then held the appeal not to be "frivolous," 616 F.2d 893; *and whether this doubt would have the following consequences:*

> (a) *Pose* an unreasonable risk of debasement of federal judicial behavior notwithstanding a growing public demand for accountability and integrity of lower Federal judges;
> (b) *Embrace* a lower standard of judicial behavior than that prevailing in the *STATE OF FLORIDA* which publicly reprimanded two Supreme Court justices under Canon 3A(4) of the Florida Code of Judicial Conduct for similar conduct but without *ex parte* work sessions *(In re Dekle,* 308 So.2d 5 (Fla. 1975); *In re Boyd,* 308 So.2d 13 (Fla. 1975));
> (c) *Threaten* an unreasonable risk of conflict with popular Florida state officials and citizens fomenting fractious strains upon the fabric of Federalism;

(d) *And* inasmuch as (i) Canon 3A(4) of the Code of Judicial Conduct of the *STATE OF GEORGIA* is no different from Florida's and (ii) the Georgia Code of Judicial Conduct applied specifically to federal referees in bankruptcy, *frustrate* an important Georgia state interest in requiring members of the State Bar of Georgia (of which this bankruptcy judge is one, of which this Court can take judicial notice from files at Administrative Office of United States Courts) to live by a higher standard of behavior, where the five decisions do not identify a federal interest which would dictate a lower federal judicial standard;

And therefore whether this case calls for an exercise of the Court's power of supervision.

2. *Whether* four months of *ex parte* work sessions conducted by a bankruptcy judge with one side to a vigorously contested, pending matter (decision unannounced) which produced a 40-page opinion and numerous orders in their favor that were researched, drafted, edited and typed in law offices for adversary parties, which contacts were without notice to or knowledge of opposing side, *and whether* breakfast between the judge and trustee prior to the second session of a hearing upon the same matter, *constitute* a departure from the accepted and usual course of judicial proceedings.

3. *Whether* silent condonation by an Art. III district judge owing a duty of supervision over an Art. I bankruptcy judge and aware of supported charges of ethical violations; affirmance of 40-page respondent-prepared bankruptcy order opinion based on "clearly erroneous" standard; and a statement on the record that "I don't care to know anything about . . . bankruptcy. . . . ;" *constitute* a departure from the accepted and usual course of judicial proceedings.

4. *Whether* a proper exercise of the supervisory power *disqualifies* the bankruptcy and district judges and *vitiates* all orders and decisions of the district judge and court of appeals which accord "clearly erroneous" treatment to findings of fact signed by the bankruptcy judge.

UNSETTLED FEDERAL QUESTIONS

5. *Whether* principles of Comity, Federalism and Fifth Amendment Due Process *require* Art. I and Art. III federal judges to adhere – not to lenient federal judicial ethics, but – to exacting standards of ethical conduct binding upon judges of State courts, in those geographical areas where the actions of federal judges impact upon those several States.

6. *Whether* a litigant *has standing* to raise at trial or on appeal a violation by Art. III and Art. I judges of the Code of Judicial Conduct for United States Judges, adopted by the Judicial Conference of the United States, April 1973.

QUESTIONS PRESENTING CONFLICT BETWEEN FIFTH CIRCUIT AND OTHER CIRCUITS

7. *Whether* it is relevant for purposes of 28 U.S.C.A. Sec. 455, Fifth Amendment Due Process, Code of Judicial Conduct for United States Judges that facts of disqualification *constitute* "extra-judicial" acts.

8. *Whether* a trial judge's automatic adoption of a prevailing party's findings of fact *is acceptable.*

9. *Whether* "fraud . . ., misrepresentation, or other misconduct of an adverse party" (Fed.R.Civ.P. 60(b)(3)) *must be "prejudic[ial],"* 607 F.2d 117, 118, before a trial judge will relieve an opposing party from a final order of a bankruptcy judge approving a settlement between a trustee and a creditor.

10. *Whether* the standard of appellate review upon a trial judge's findings of fact adopted via *ex parte* work sessions *should be* the "clearly erroneous" standard under Fed.R.Civ.P. 52.

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CORRECTIONS

September 18, 1980

p. 2 Before first line, add: "("Paneling") in July, 1973. Aetna acquired a security inter-"

p. 9 Second full paragraph, line 1: "September 8, 1977" should read "September 1, 1977"

Also in second full paragraph, line 5, a period should appear after "day." After "day" a line is omitted: "Seven days later, September 8, the judge signed an order"

p. 10 At end of Footnote 16A, add: "Aetna's brief was filed in *Hampton Lumber Sales Co. v. Aetna Business Credit, Inc.*, No. C 74-1679A (August 22, 1974), on January 19, 1978."

p. 11 Footnote 18A should read: "See App. 249-251, 253.

Footnote 19A, add after "EC 8-6" and before "of *Rules and Regulations*": "(d) Standard 60, D.R. 4-101, Standard 28."

Footnote 20 omits the first page reference: "25."

p. 18 First full paragraph, line 1: "This rule" should read "B.R. 505."

p. 20 After first quotation, add: "[Emphasis added.]"

III. REFERENCES TO FIVE REPORTED OPINIONS AND ORDERS IN COURTS BELOW

Fifth Circuit Case No. 79-1076, sometimes referred to herein as "the Fed. R. Civ. P. 60(b) case", is reported at *In re Georgia Paneling Supply, Inc.*, 616 F.2d 893 (5th Cir. 1980), *reinstating*[sic] 607 F.2d 117 (5th Cir.), *vacated* 613 F.2d 137 (1979). Said case resulted from a FRAP 6(a) petition for appeal which was allowed at 588 F.2d 93 (5th Cir. 1978), *vacating* 581 F.2d 520 (5th Cir. 1978).

IV. GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

A. The *apparent* date of the judgment sought to be reviewed in the 60(b) case is May 8, 1980. However, a letter dated July 22, 1980 indicates that entry of original judgment was made *erroneously* upon *vacated* November 19, 1979 judgment. The error was corrected July 22, 1980 by issuance of May 8, 1980 judgment. See App. 76-79.

B. The date of the order denying petitioners' petition for rehearing and petition for rehearing *en banc* in the 60(b) case is June 3, 1980.

C. The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment by writ of certiorari is 28 U.S.C. Section 1254 (1) (1970).

V. CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED IN THE CASES

Sources are referenced in the preceding Table of Contents at pages x-xii which is a lengthy table of contents to "Part Three: Constitutional Provisions, Statutes, Regulations Involved", located in Petitioners' Joint Appendix, App. 169, to which petitioners respectfully call attention.

VI. STATEMENT OF THE CASE

A. Pre-Bankruptcy Facts

Aetna made a loan[1] to Georgia Paneling Company, Inc.

[1]Contrary to Aetna's assertions below, the law of North Carolina — which is made applicable to the Aetna-prepared documents — holds that such accounts receivable financing constitutes a "loan". *North Carolina National Bank v. Lumbermens Mutual Casualty Co.*, 335 F.2d 486 (4th Cir. 1964).

("Paneling") in July, 1973. Aetna acquired a security interest in Paneling's inventory, accounts receivable, proceeds, and perfected it. *For the life of the loan,* Aetna kept track of advances, payments and credits on a "M[onth] T[o] D[ate] Transaction Summary" in the name of "GA PANELING CO". *From inception to date of bankruptcy there was always an unpaid balance.* Further loan documents were signed in October, 1973 to reflect an increase in the loan amount and on January 7, 1974 purportedly to reflect a decrease in the interest rate.

Aetna's pre-loan investigative audit examined assets owned by a sister corporation, the bankrupt, which had signed a lease-purchase agreement for a warehouse along a railroad spur. Aetna required the bankrupt to sign a separate set of Aetna-prepared loan documents each time Paneling did so, but Aetna, as drafter, took the position initially and consistently that there was "just one loan."[2] With the opening of the warehouse in August, 1973, the bankrupt could order boxcars of goods from suppliers, such as the corporate petitioners, at a lower price. In 1974 Aetna wired advances in respect of the Paneling loan directly to the bankrupt's bank account from which suppliers were paid.[3]

Contractual arrangements were made with Roberts to sell goods under the corporate name, Georgia Paneling Company of Forest Park, Inc. ("Forest Park"), at an ongoing building materials store in an Atlanta suburb which generated substantial cash flow. Roberts owned the equipment (not Paneling, as petitioners were told by the bankrupt). The bankrupt transferred inventory to Paneling which consigned it to Forest Park. Upon sale a memoran-

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[2] Under Georgia law, should a contract be deemed ambiguous, it is construed most strongly against the drafter. Ga Code Ann. Sec. 20-704 (5). *Cf. C.A. May Marine Supply Co. v. Brunswick Corp.*, 557 F.2d 1163 (5th Cir. 1977). Aetna has never shown what North Carolina law provides; consequently, if an ambiguous contract, Georgia law would be applied. *Id.*

[3] Aetna's opinion for the court distorts the facts in stating there was "no evidence" that a loan was made to Paneling. Aetna in writing its own appellate brief to the Fifth Circuit conceded there was "conflicting evidence" (pp.14-15) and the Fifth Circuit had earlier so found. 581 F.2d 520, 521. Aetna's bankruptcy opinion mentioned that Paneling signed loan documents in June, 1973 and that the bankrupt signed loan documents in June 1973, October 1973 and January 7, 1974. The inference is that Paneling signed the first loan documents, only. This inference is refuted by the fact that Paneling too signed loan documents

Footnotes continued on next page

dum was created and remitted to Paneling. On credit sales Paneling prepared an invoice that was transmitted to

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in October, 1973 and January 1974. Aetna's Duke produced the October Paneling note. Ignored also was the fact that Forest Park signed loan documents in January, 1974, for the first time.

Against this backdrop is Aetna's June 25, 1973 letter to Paneling:

[Letterhead of Aetna Business Credit, Inc., Highpoint, North Carolina]

June 25, 1973

Mr. Edward C. May, Setretary and Treasurer
Georgia Paneling Co., Inc.
122 Oak Street
Roswell, Georgia

Dear Ed:

Enclosed please find legal documents necessary to begin a financing arrangement with Aetna Business Credit, Inc. I have two sets of documents, one each for Georgia Paneling Co., Inc. and Georgia Paneling Supply Co., Inc. In addition, you will find cross-corporate guarantys[sic] and personal guaranty form for the principal shareholders covering the debt of either corporation. As a practical matter, either set of documents might be mutually exclusive, i.e., loan limit is $250,000.00. Due to the transfer of goods between corporations, we have no choice in the structuring of these documents, but we would prefer to use one corporation and one bank account for distribution of proceeds, if this is convenient for you.

Mr. Tom Duke will be by your office to assist you in the execution of the documents (especially the cross-corporate guarantys. They may appear to be a bit confusing).

* * *

Very truly yours,
AETNA BUSINESS CREDIT, INC.

Charles R. White,
Vice President

At the May 3, 4, 1977 deposition of Charles R. White he explained the letter by stating there was "just one loan." That statement raised the question as to which corporation the loan was made. His affidavit in a related plenary action a month later, the MTD transaction summaries furnished thereafter, indicate plainly that the loan was to Paneling. There could not have been one loan with joint obligors because Aetna chose to use two separate sets of its own prepared loan documents.The tenor of printed documents is construed against the author. *C. A. May Marine Supply Co. v. Brunswick Corp., supra n. 2.*

The fact that 1974 advances were made into the bankrupt's bank account is not indicative of what happened in 1973. C&S never would furnish those documents, despite repeated requests. Nevertheless, "just

Footnotes continued on next page

Aetna. Customers' checks in payment of credit invoices were physically transmitted to Aetna. On cash sales a memorandum was remitted to Paneling and the cash was transferred to the bankrupt. At the end of each month, Paneling, the bankrupt, Forest Park, and Roberts settled accounts according to various agreements.

The Forest Park store burned down December 31, 1973 (not January 19, 1974 as sworn by the bankrupt in the Statement of Affairs). On January 7, 1974, Aetna required Forest Park, for the first time, to sign a complete set of loan documents, purporting to grant a security interest in the destroyed equipment. T. R. Locke, president of the companies, signed the 20 or more loan documents without reading them, satisfied with a decrease in the interest rate.[4]

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one loan" was made to Paneling; and the MTD transaction summaries conclusively establish that the loan was never paid off. It began as Paneling's loan and ended unpaid as Paneling's loan.

Aetna could foreclose against the bankrupt only as a guarantor of Paneling but the guaranty was not secured. Therefore, corporate action by the bankrupt would seem required, although no further corporate action would have been necessary had the loan been made to the bankrupt.

Another distortion was that all inventory and accounts receivable were owned by the bankrupt. In fact, discovery documents in *Pennington v. Aetna* show that Paneling owned both. See Balance Sheets for Paneling at March 31, 1973, March 15, 1974. The bankruptcy judge's abrupt termination of the 60(b) hearing and failure to follow through with the tentatively-scheduled November 9, 1977 hearing prevented petitioners from establishing this testimony.

[4] Aetna also wrote for the bankruptcy judge that the fire took place December 31, 1973; and that petitioners knew it, discussed it among themselves at the time, and were aware that fire insurance proceeds were owned and transmitted to Aetna by the bankrupt. Therefore, the evidence was not new nor did petitioners act with due diligence.

The truth is that the petitioners believed the bankrupt's verified Statement of Affairs which stated that the fire occurred January 19, 1974, which was *after* the January 7, 1974 loan documents were executed. The depositon of Quinault Pacific Corporation's A. R. Johnson in *Pennington v. Aetna* establishes that he had no contact with the bankrupt from December 26, 1973 to late January, 1974. Therefore, Quinault could not have known about the fire until late January and that was after the fire date ultimately given in the Statement of Affairs six months later. Furthermore, Johnson's testimony is that the discussions concerned the bankrupt's nonpayment of his invoice. *He did not recall the year of any other discussions which were incidental.*

The truth is that while petitioners knew the fire insurance proceeds had been paid to Aetna, petitioners were not aware that (a) the equipment was owned by Roberts, (b) Forest Park provided considerable cash flow to the bankrupt, (c) the January 7, 1974 loan documents

Footnotes continued on next page

Earlier in December, 1973, after a comprehensive audit, Aetna had become very dissatisfied with the Paneling loan and decided to liquidate it. Aetna was aware of the fire and the bankrupt's receipt of a $60,560 check because the bankrupt and Roberts, beneficially, were insured by Aetna's parent company, a major casualty insurer. $26,000 of the check represented Roberts' equipment, and Aetna knew it. Aetna claimed $34,560 of the check as proceeds of inventory and threatened criminal prosecution if payment for or on account of inventory was cashed or deposited by the bankrupt. When the bankrupt delayed remitting the check, Aetna wrote on February 13, 1974 stating that a recent audit showed a "negative" net worth for the combined sister corporations, Paneling's total debt was $229,000, and Aetna wanted to liquidate the loan.

Paneling and the Bankrupt were desperate for cash ($171,000 in December advances had been reduced to $71,000 in January); and upon Aetna's verbal promise (a) to return $26,000 so that Forest Park could be reopened and (b) to resume a normal lender-borrower relationship, the bankrupt remitted the $60,560 check and Paneling $60,339 of customers' checks. The record contains Roberts' affidavit to use the proceeds to reopen Forest Park and Locke's to give the $26,000 to Roberts if it should come to the bankrupt.

Aetna reneged and ultimately paid off Roberts' debt to the First National Bank. *As a consequence, the bankrupt was unable to procure the reopening of Forest Park or to pay its debts in the ordinary course of business and rendered irretrievably insolvent.* Commencing February 24, 1974, the beginning of the four-month voidable preference period[5], Aetna collected ultimately $5,000 to $10,000 more

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were without consideration and fraudulent. They were unaware of these facts because all that was important under their misapprehended date of fire (Jan. 19, 1974), was that the bankrupt was (seemingly) *benefited* at the expense of Forest Park. When the real fire date (Dec. 31, 1973) was learned, a question of the validity of the January 7, 1974 loan documents, including the so-called "cross-collateralization agreement" naturally surfaced; and inquiry into the whole transaction disclosed the interest of Roberts and the *harm* done to the bankrupt rather than benefit.

[5] Bankruptcy Act of 1898, Sec. 60b. Other sections involved are Sections 67 and 70.

than the $229,000 owed on February 13. Aetna did so by pumping just enough money into the bankrupt that its major suppliers, the corporate petitioners, would keep selling it goods which Paneling in turn sold to the public whose checks in payment were transmitted to Aetna and collected.

B. **Newly Discovered Substantive Facts.**

Fearing dismemberment of the bankrupt upon Aetna's notorious foreclosure of June 3, 1974, petitioners caused an involuntary petition in bankruptcy to be filed June 24, 1974 and a *receiver* to be appointed July 29, 1974 to preserve the books and records. The receiver represented that he could not locate any books and records. At the first meeting of creditors, September 10, 1974, the receiver was appointed trustee. The *trustee* claimed all along he had no important books or records. Petitioners examined what was represented as his books and records at offices of trustee's co-counsel.

Aetna represented at a settlement hearing, May 18, 1976, that the facts were "simple" and, among them, Aetna had made a loan to the *bankrupt*. In a December, 1976 response to discovery in a related plenary action, *Aetna represented that its books and records pertaining to the bankrupt's sister corporations were irrelevant to a charge that Aetna's bad faith should estop it too to deny it was an unsecured creditor subordinated to petitioners' claims against the bankrupt*. After Aetna's discovery of petitioners had been handled by agreement of counsel, Aetna refused to produce any documents in said plenary action. Petitioners filed a motion to compel discovery in April 1977. At a chambers conference with the district judge who refused to order sanctions, Aetna promised to produce documents to petitioners but did not comply even in part until April 27, 1977. Aetna delivered the rest in dribs over a period of 30 days, or by late May 1977. From this information petitioners were at last able to discern the true facts of substantive fraud. Their 60(b) motion was filed May 31, 1977. At a deposition in mid-June 1977 of a former Aetna vice president, petitioners obtained the last critical, material evidence unproduced and hence concealed by Aetna: Paneling's October, 1973 Aetna-prepared promissory note.

Petitioners learned that the trustee had in fact obtained copies of invoices covering the last six months of business operations. Analysis showed that 80 percent in dollar value were on Paneling's letterhead and 20 percent on the bankrupt's. Petitioners learned that Aetna's MTD transaction summaries were carried in the name of "GA PANELING CO" and the receiver-trustee had been receiving them from Aetna since bankruptcy. Petitioners learned that the bankrupt had committed perjury by representing in the Statement of Affairs that the Forest Park fire had occurred January 19, 1974 (rather than December 31, 1973 as Aetna's unjustifiably-withheld audits disclosed). Locke, *who had verified the statement, had personally guaranteed all of Paneling's indebtedness to Aetna.* Only then did petitioners have cause to examine the consideration for the January 7, 1974 Forest Park loan documents (none) and then the identity of the owner of the previously destroyed equipment. Locke had sworn that all equipment was owned by Paneling; inquiry in May 1977 disclosed Roberts to be the owner of Forest Park's. Only then did petitioners conceptualize that Aetna's conduct had harmed the bankrupt (deprived it of cash flow from Forest Park) rather than benefited it (paid bankrupt's loan at expense of Forest Park).

Furthermore, petitioners discerned that cross-collateralization agreement allegedly signed January 7, 1974 was not executed until after March 8, 1974, an Aetna audit noting the lack thereof. Petitioners then had reason to inquire into the bankrupt's guaranty of Paneling's loan to learn it was unsecured.

These facts constitute the basis for an estoppel in favor of the trustee for Aetna's bad faith conduct toward the bankrupt preventing Aetna from setting up its perfected security interest against the trustee, even if the loan were to the bankrupt and not Paneling. *Cf. Central Soya Co., Inc. v. Bundrick*, 137 Ga. App. 63, 222 S.E. 2d 852 (1975); *Pennington, Trustee v. Aetna Business Credit, Inc.*, No. 75-1540A (N.D. Ga. March 30, 1978) (Order denying Aetna's Motion for Summary Judgment); *In re Samuels & Co., Inc.*, 526 F.2d 1238 (5th Cir. 1976) (*en banc*), *cert. denied* 429 U.S. 834.

C. **Post-Bankruptcy Facts.**

At the time newly discovered substantive evidence was obtained and petitioners were re-analyzing the Aetna-Paneling-bankrupt-Forest Park-Roberts relationship, petitioners' appeal from the bankruptcy judge's June 17, 1976 order approving a $350 settlement between Aetna and the trustee *over petitioners' protests for Aetna's harassment of the bankrupt* had just been affirmed on April 15, 1977 by the district judge. Petitioners had urged on appeal that the bankruptcy judge should have deferred to the district judge before whom the plenary action was pending (*cf. Chicago & Southern Airlines, Inc. v. Waterman Steamship Co.*, 333 U.S. 103 (1948)), or that an evidentiary hearing should have been held in bankruptcy court prior to approval (*Protective Committee v. Anderson*, 390 U.S. 414 (1968)). Petitioners were in a dilemma about how to set aside the settlement by reason of the newly-discovered evidence. They decided to move the district judge on May 16, 1977 to allow them an extension of time to file an appeal to the court of appeals. At the same time petitioners were aware that the maximum one year period under Fed. R. Civ. P. 60(b) (2), (3) for setting aside a judgment for newly discovered evidence or adversary party misconduct would expire June 17, 1977. Under this pressure they moved the district judge on May 31, 1977 to vacate his April 15th affirmance under Rule 60(b).

The district judge denied the motion to extend time to appeal, set a hearing date on the 60(b) motion (July 19, 1977), and held that petitioners' right of appeal would be preserved by his ruling on the 60(b) motion. Order of June 15, 1977. At the 60(b) hearing, the district judge determined to address in the first instance several procedural issues in the case. On July 22, 1977 he denied the 60(b) (2), (3), (6) motion because he perceived (erroneously) that more than one year had expired as to grounds (2), (3) and no extraordinary circumstances had been shown for ground (6). Petitioners filed a second Fed.R.Civ.P. 60 motion to rectify the district judge's misapprehension of fact, resulting in his order of August 26, 1977 remanding the 60(b) (2), (3) motion to the bankruptcy judge for an evidentiary hearing.

D. **Facts of Judicial Disqualification**[6]

(It should be borne in mind that petitioners were unaware of the italicized facts of judicial disqualification until February 28, 1978, with the exception of one petitioner viewing the breakfast meeting referenced below.)

On September 8, 1977 Aetna's attorney, C. Edward Dobbs, submitted an application *to the bankruptcy judge ex parte* calling for a hearing on an assessment of attorneys' fees against petitioners for bad faith appeal and 60(b) motion. The bankruptcy judge signed an order that day calling for a joint hearing on petitioners' remanded 60(b) motion and Aetna's fee motion for September 19, 1977 at 8:00 A.M. The bankruptcy judge *received Aetna's attorney* because he was one of the referee's few hand-picked no-asset trustees who had handled over 200 no-asset cases for the referee which the referee would have had to handle alone without a trustee.

Informed of Aetna's fee motion, the trustee's co-counsel, Freeman & Hawkins (by D. L. Cronkright, partner) submitted the next day, Friday, September 9, a similar application *ex parte to the bankruptcy judge who signed a Cronkright-prepared order* Monday, September 12, giving notice of a hearing on the same date and time as the two previous motions. The referee *received* the trustee, co-counsel because the trustee was another of the referee's no-asset trustees who had served as such in a large number of cases.

Prior to the September 19, concurrent hearing on petitioners' remanded 60(b) motion and respondents' motions for fee award (no amount specified), *the bankruptcy judge initiated contact with Cronkright;*[7] *and with the trustee they researched*[8]*, drafted and typed two other pre-hearing orders* denying petitioners' motions,[9] *excluded petitioners' counsel,*[10] one motion of which sought a continuance because of

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[6] See generally App. 242-253.

[7] "'The judge asked me to take an order.': Depo. D. L. Cronkright, March 3, 1978, 85.

[8] R.(79-1076) Vol. II 204-207.

[9] "Mr. Cronkright and I prepared that order, or prepared a draft. We brought it to the Judge." 2d. Supp. R. (78-3370) Vol. II 57.

[10] "Q [By petitioners' counsel] Well, did you call me or my office prior to going to see Judge Norton with Cronkright? A [By the trustee] Well, I'm sure we didn't because you weren't there." Depo. J. C. Pennington, March 3, 1978, 24.

an unrelated jury trial on September 19, which petitioners' counsel was scheduled to try.[11]

Prior to the second day (September 20, 1977) of the concurrent hearing, the bankruptcy judge had breakfast with the trustee.[12] An employee of petitioner International Paper Company personally observed them having breakfast.

The presentation of petitioners' case under rule 60(b) was frustrated by constant interruptions by respondents which were condoned by the bankruptcy judge.[13]

Reserving decision on the 60(b) motion and calling for briefs of evidence whether there was any material fact in dispute,[14] *the bankruptcy judge secretly contacted Aetna's lawyer with respect to an order opinion denying the 60(b) motion.*[15]

The 40-page opinion *was drafted by Aetna's lawyer.*[16A] The 40-page opinion *was typed in the offices of Aetna's law firm.*[16] The 40-page opinion *was discussed ex parte by the*

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[11] Indeed, District (now Circuit) Judge Albert J. Henderson, Jr.'s law clerk interrupted the hearing regarding counsel's availability for trial. Supp. R. (79-1076) Vol. IV. 92.

[12] *Cf.* ". . . I have had breakfast with him before, and it could have been that day . . ." (Depo. J. C. Pennington, March 3, 1978, 27) *with* "I don't have breakfast in Atlanta, Georgia, with anybody . . ." (Bankruptcy Judge, 2d. Supp. R. (78-3370) Vol. II 65.)

[13] Supp. R.(79-1076) Vol. IV. 60, 61, 89, 96, 32, 106.
Supp. R.(79-1076) Vol. V. 227, 228, 245.

[14] Supp. R. (79-1076) Vol. V. 302.

[15] Bankruptcy Judge did not deny this charge made to him by petitioners' counsel in open court. 2d. Supp. R. (78-3370) Vol. II. 25.

[16] "Mr. Dobbs' office typed an opinion for this Court." 2d. Supp. R. (78-3370) Vol. II. 25.

[16A] *Compare* use of the following adverbs in the January 5, 1978, opinion: "First" (App. 46), "Secondly" (App. 46), "Thirdly" (App. 47), "Fourthly" (App. 47), "Fifthly (App. 49), "Sixthly" (App. 50), "Seventhly" (App. 50); "Finally" (App. 51, 56, 59, 42, 44); *with* use of the following adverbs opening paragraphs in Aetna's January 19, 1978 Brief in Support of Motion for Reconsideration: "First" (App. 235), "Secondly" (Id.), "Thirdly" (Id.), "Fourthly" (Id.), "Fifthly" (Id.), "Sixthly" (App. 236), "Seventhly" (Id.), "Eighthly" (Id.), "Ninthly" (Id.), "Tenthly" (Id.), "Eleventhly" (Id.), "Next" (Id.), "Finally" (App. 238). Aetna's Brief was designated to the district judge for inclusion in the record on appeal to Fifth Cir. but the district judge disallowed it; upon petitioners' Motion to Supplement the Record on Appeal, Fifth Cir. denied same April 4, 1979.

bankruptcy judge and Aetna's lawyer.[17] The 40-page opinion was *edited and revised by trustee's co-counsel.*[18]

Aetna and the trustee never produced any competent evidence to substantiate their contentions, only unauthenticated exhibits.

The 40-page opinion set a date for the continued hearing upon respondents' motion for fee awards.

The foregoing acts were accomplished prior to the filing of the December 20, 1977 order of the bankruptcy judge, although the 40-page opinion was not filed until January 5, 1978.[18A]

At the end of the first day (February 14, 1978) of continued fee hearing, the bankruptcy judge ruled orally that he "certainly" would not hold petitioners' counsel liable for respondents' attorneys' fees, although he would hold petitioners liable for some part.[19] At that time, no specific amount had been sought in any document of record.

At the second day (March 6, 1978) of the continued hearing, having received (February 28, 1978) respondents' time records, by clerical error, seeking almost $40,000.00 of attorneys' fees but clearly proving numerous instances of misbehavior by the bankruptcy judge, the trustee, trustee's co-counsel and Aetna's lawyer, petitioners' counsel had a legal and ethical duty to,[19A] and did confront the bankruptcy judge, who was enraged, prompting him to admit "we even discussed it [the draft 40-page opinion, *ex parte*]."[20]

The bankruptcy judge's June 7, 1978, order holds petitioners' counsel jointly and severally liable with petitioners for $36,331.50 of attorneys' fees to the trustee, acting as his own attorney,[20A] to trustee's co-counsel and to

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[17] "[w]e even discussed it . . ." See note 16.

[18] "Review and editing of proposed Order for Judge Norton's signature provided by Ed Dobbs." R. (78-3370) Vol. I 177 et seq., 212 et seq.; R.(79-1076) Vol. I 84-112, 39-45, 46-80; Depo. D. L. Cronkright, 92-93.

[18A] See App. at 207-212.

[19] 2d. Supp. R. Vol. I. 103.

[19A] Counsel's duties are set forth in (a) EC 1-4, DR 1-103, DR 1-102 (A); and in (b) EC 7-35, DR 7-102 (5), (8); and in (c) Canon 8, EC 8-5, EC 8-6; of *Rules and Regulations for Organization and Government of State Bar of Georgia*, 241 Ga.643 et seq. App. at 207-212.

[20] 2d. Supp. R. Vol. II 36, 65.

[20A] *Contra, In re First Colonial Corp of America*, 544 F.2d 1291 at 1299 (5th Cir. 1977).

Aetna, *including the time referenced above.*

Previously announcing on the record that "I don't care to know anything about . . . bankruptcy. . . . ",[21] the *district judge entertained an ex parte application by the bankruptcy judge (and possibly respondents) to open depositions in a pending plenary action, Pennington v. Aetna Business Credit, Inc., et al.,* No.C75-1540A (N.D.GA., filed August, 1975), *in order to furnish alleged support for the bankruptcy judge's award of attorneys' fees against petitioners,*[22] *after which* district judge affirmed the award, tossing off petitioners' charges of partiality as "not exemplary, but neither was it clearly erroneous,"[23] after having had full details brought to his attention months before.[23A]

At oral argument on April 14, 1980 upon the fee appeal (Case No. 78-3370), before a *third* panel of the United States Court of Appeals for the Fifth Circuit to grapple with the 60(b) case, the second to hear the fee award case, respondents' counsel made admissions *in judico* that (a) Aetna had drafted the order opinion for the bankruptcy judge and (b) the judge and trustee had breakfasted together the day in issue. Considering petitioners' evidence, this left no doubt but that the bankruptcy judge had perpetrated misrepresentations of material fact and Aetna had made misleading statements in its briefs to the first and second panels of the Fifth Circuit. They also lend themselves to the reasonable inference that the fee award order of June 7, 1978 and supporting memoranda of September 11, 1978 and November 14, 1978 were likewise prepared by respondents. Ide referred to preparation of the 40-page opinion by his firm as a matter of "common practice in that bankruptcy court." As shown at another place, this assertion is untrue. *Infra* at 20. This would suggest too that Aetna's liasion with the bankruptcy judge was knowingly and wilfully calculated to assist Aetna to recover $600,000.00 in general, special and punitive damages against the corporate petitioners sought in its October 25, 1977 counterclaim filed in the plenary action. App. 222.

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[21] Supp. R.(79-1076) Vol. III. 34.

[22] Order, July 25, 1978, in *Pennington v. Aetna*, App. at 142.

[23] Order, August 30, 1978, at App. at 86.

[23A] R. (79-1076) Vol. I. 39-45, 46-80, 84-112; R.(78-3370) Vol. I at 177 and at 212.

E. Manner in Which Facts of Judicial Disqualification Were Learned and Petitioners' Resulting Dilemma

The fee hearing *and* the remanded 60(b) hearing came on for hearing concurrently on September 19, 1977 before the bankruptcy judge. His schedule allowed two (2) hours for both matters.[23B] The litigation, even at that point, was complex. He was fully aware that petitioners believed their claims well founded in fact and at law. Objective evidence of close personal and professional relationships among the bankruptcy judge, the trustee and Aetna's counsel were of gnawing concern to petitioners. Accordingly, on September 19, 1977, they filed "Motion to Reassign Case" to another bankruptcy judge. Observing the bankruptcy judge and trustee at breakfast the following day did not dissipate their concern[24].

Respondents interpreted the motion as a motion to disqualify the bankruptcy judge[25]. Except for counsel's desire not to enrage the bankruptcy judge, his upbringing to handle sensitive issues euphemistically and his knowledge of *Mitchell v. Sirica*, 502 F.2d 375, (D.C. Cir.), *cert. denied* 94 S. Ct. 3232 (1974), he might have so styled it. But if he had, it would have been denied and affirmed on appeal on the evidence available to him at that time. *Id.* Ironically, the bankruptcy judge denied the motion to reassign on Sept. 23, 1977, while at the same time (as the facts learned Feb. 28, 1978, support) secretly engaging in continuous *ex parte* contacts with respondents.

In February 1978 upon acquiring knowledge of judicial disqualification, the 60(b) case was on appeal to the district court. Petitioners could not raise his disqualification in bankruptcy court and have any effect on the 60(b) determination. They had to raise the issue on appeal in the district court. They did so. This approach is approved in

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[23B] Ultimately, some 8 hours were used on the 60(b) motion and 23 hours were expended on the fee award rather than the 2 hours initially allotted. Petitioners believe this warranted their Motion to Reassign, although part of the fee award was based on filing the motion.

[24] Petitioners' research disclosed such conduct alone was not sufficient to disqualify, *Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir.1974), *cert. denied*, 94 S.Ct. 3232 (1974).

[25] 2d. Supp. R. (78-3370) Vol. I at 35; Supp. R.(79-1076) Vol. VI at 35. (Transcript February 14, 1978.)

Davis v. Board of School Commissioners, 517 F.2d 1044, 1051 (5th Cir. 1975).

The evidence of disqualification was learned February 28, 1978 during a recess in the continued hearing on the fee application. The next date scheduled was March 6, 1978. On February 28, petitioners were advised that total fees sought could be close to $40,000. Petitioners were in great peril: they believed the bankruptcy judge was not a man of integrity and would deny any motion for recusal with or without a 28 U.S.C. Sec. 144 affidavit (which would simply divert attention to the lawyer and a document). He could enter a huge award of attorneys fees against petitioners (but had said he would not against petitioners' counsel February 14, 1978). T 103. Prevailing law indicated that while disqualification could be raised by mandamus, it would be denied where appeal lay. Finally, 28 U.S.C.A. Sec. 455 is self-enforcing on its face and the Fifth Circuit had ruled it self-enforcing on the part of the judge. *Davis v. Board of School Commissioners*, 517 F2d 1044, 1051 (5th Cir. 1975). If a party could establish that a judge's conduct raised a question of partiality, the judge would be obliged to disqualify himself *sua sponte*. Although the bankruptcy judge undoubtably would not do so, his failure would be reviewable on appeal and the diversion of an affidavit would be averted[26].

For the foregoing reasons, petitioners confronted the bankruptcy judge with as much tact as humanly possible on March 6, 1978 with the charge that he had violated Canon 3A (4) of the Code of Judicial Conduct for United States Judges, T 20, hoping against hope that he would not hurl a huge fee award against them. The bankruptcy judge was enraged. T36, 65. He stated that he was on trial; that an accusation had been made against him. T19, 22. He did not disqualify. He never mentioned disqualification in any document of record. By contrast, the District Judge recognized that the issue of the bankruptcy judge's disqualification was before him in his orders of August 30, 1978, and October 13, 1978, affirming the fee award. The Fifth Circuit recognized that the issue of judicial disqualification

[26] In the 69 years that 28 U.S.C. Sec.144 has been on the books, only a few affidavits have been found legally sufficient, according to petitioners' research.

under 28 U.S.C.A. Sec. 455 was before it. Initially in the 60(b) case the Fifth Circuit held the misbehavior to be extrajudicial. 581 F2d at 521. Subsequently, the (first) panel vacated the opinion "[b]ecause of allegations of judicial misconduct." 588 F2d 93. Petitioners interpret this as a change of position on the issue of extrajudiciality.

F. Aetna's $70,000 Settlement with Hampton

After the first vacation, 588 F.2d 93, and before the second panel opinion, 607 F.2d 117, Aetna paid Hampton $70,000.00 to drop all litigation against Aetna including the 60(b) motion, Hampton's plenary action against Aetna for conversion of $39,000 of goods, Hampton's intervention against Aetna, in return for which Aetna would dismiss its $600,000 counterclaim against Hampton and its $36,000 joint and several fee award against Hampton. The remaining petitioners urged the Fifth Circuit to remand for a hearing at which they would be allowed to show that Aetna did not perceive petitioners had injured Aetna. Cf. *Lloyd v. Thomas*, 195 F2d 486 (7th Cir. 1952); Fed. R. Evidence 408.

VII. SUPREME COURT SHOULD INVOKE ITS INHERENT POWER OF SUPERVISION TO PROTECT THE INTEGRITY OF THE FEDERAL COURTS AND TO DETER ILLEGALITY

A. Nature of General Supervisory Power

"[T]he supervisory power serves the 'two-fold' purpose of deterring illegality and protecting judicial integrity." *United States v. Payner*, ___ U.S. ___, 48 USLW 4829 at 4832, n8 (1980). While the supervisory power has been applied most notably in criminal cases, see, e.g., *McNabb v. United States*, 318 U.S. 332 (1943); *Nardone v. United States*, 308 U.S. 338 (1939), it has been utilized by an Art. III court to curb an Art. I bankruptcy court's excessive use of power to interfere with state court proceedings, *Calloway, Trustee v. Benton*, 336 U.S. 132 (1949), and to restrict an erroneous exercise of Art. III judicial power in civil cases. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975); *Thiel v. Southern Pacific Co., 328 U.S. 217 (1946)*. Deprivation of an impartial judge can never be

considered harmless error. *Chapman v. California*, 386 U.S. 18, 23 (1966)

B. Nature of Special Supervisory Power In and Over Court of Bankruptcy

"Court of bankruptcy" was created by Congress in the Bankruptcy Act of 1898[27] as an Art. I court[28], and was defined as an Art. III district judge[29] and, upon reference, an Art. I referee in bankruptcy[30]. The latter was appointed to a six year term by a majority of the district judges for the district[31]. The referee could be removed from office for incompetency, misconduct or neglect of duty by that same majority[32]. On petition for review by the district judge, the latter could hear evidence in assessing the correctness of the referee's findings of fact[33]. The referee had no power of contempt, but could certify facts thereof to the district court for disposition[34]. Supervisory power was complete.

Effective October 1, 1973, Bankruptcy Rules of Procedure were approved by the Supreme Court[35] under enabling legislation which permitted substantive changes in the Act of 1898[36]. It designated the referee as "bankruptcy judge" when contested proceedings were commenced by complaint[37]. The referee was given power to assess a fine up to $250 for a criminal contempt committed in his presence, but more serious conduct deserving of a larger fine had to be certified to the district court.[39] The referee could be removed as under prior law.[40] Except for the bankruptcy judge's November 14, 1978 memorandum and the district judge's February 20, 1979 order affirming the former, all judicial acts in the instant case took place after the effective date of the 1973 Bankruptcy Rules but before the Nov. 6, 1978 enactment of the Bankruptcy Code of 1978. The latter provided that on date of enactment,

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[27] Act of July 1, 1898, c. 541, 30 Stat. 544 (1898).
[28] U.S. Const. Art. I, Sec. 8, cls. 4, 18.
[29] Act of July 1, 1898, C. 541, Sec. 1(10), 30 Stat. 544 (1898).
[30] *Gilbertson v. United States*, 168 F. 672 (7th Cir. 1909).
[31] Act of July 1, 1898, c. 541, Sec. 34, 30 Stat. 655 (1898).
[32] *Id.*
[33] *Id.* Sec. 23
[34] *Id.* Sec. 41
[35] 411 U.S. 991 (1973).
[36] 28 U.S.C. Sec. 2075 (1970).
[37] B.R. 901(7).
[39] B.R. 920.
[40] Act of July 1, 1898, c. 541, Sec. 34, 30 Stat. 544 (1898).

November 6, 1978, referees were to be henceforward called bankruptcy judges regardless of their function.[41] While a bankruptcy judge could still be removed for incompetency, misconduct or neglect of duty, the judicial council for the circuit alone could remove him.[42] The 1898 Act was repealed effective October 1, 1979[43] but the Bankruptcy Rules of Procedure are to be followed until March 31, 1984 unless inconsistent with the 1978 Code.[44] The 1978 Code allows the bankruptcy judge to punish contempts committed in the judge's presence so long as the conduct does not warrant imprisonment.[45] During the transition period, the district courts will continue to review findings of fact and conclusions of law of bankruptcy judges.[46] After April 1, 1984 review will be by a panel of three bankruptcy judges with ultimate review by the court of appeals.[47] At present district courts possess some supervisory power over bankruptcy judges.

C. Nature of Ethical Precepts Binding on Court of Bankruptcy

Adopted by the American Bar Association in 1924, the Canons of Judicial Ethics came to represent the norm for all judicial behavior. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). In 1967 the National Conference of Referees in Bankruptcy adopted a resolution affirming that referees were subject to the Canons. R. L. Hiller, "Problems of Judicial Ethics for Referees in Bankruptcy," *Proceedings of Fifth Seminar for Newly Appointed Referees in Bankruptcy* (1968) at p. 4.

A new Code of Judicial Conduct was adopted by the American Bar Association in 1972 and by the Judicial Conference of the United States in April, 1973.[48] On December 5, 1974 Canon 3(C) was enacted into law as new 28 USCA Sec. 455 (expanding the scope of a 1911 statute).[49]

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[41] Act of November 6, 1978, Pub. L. No. 95-598, Sec. 213, 92 Stat. 2549 (1978) (to be codified as 28 U.S.C. Sec. 451).
[42] *Id.* Sec. 201.
[43] *Id.* Sec. 402(a).
[44] *Id.* Sec. 404(a).
[45] *Id.* Sec. 241.
[46] *Id.* Sec. 405.
[47] *Id.* Sec. 201.
[48] Judicial Conference of the United States, *Reports of Procedure*, April 5-6, 1973, pp. 9-10.
[49] Act of December 5, 1974, Pub.L. No. 93-512, 88 Stat. 1609 (1974)

The Code of Judicial Conduct for United States Judges and 28 USCA Sec. 455 were fully binding on the Art. III judges and Art. I referee in bankruptcy at all material times in the instant case. The Bankruptcy Code of 1978 struck "referees in bankruptcy" from Sec. 455,[50] effective November 6, 1978, because on that, the effective date of the Code, the title of referee was officially changed to bankruptcy judge.[51] As such, they were "judges", albeit Art. I judges.

This rule reflected a new ethical consensus following upon the Code of Judicial Conduct. Only Rule 505 (b)(1) which incorporated and superseded Sec. 39b(1) of the 1898 Act had any predecessor under the Act.[52] The rule became effective October 1, 1973.[53]

D. **Improper Conduct in Court of Bankruptcy.**

1. *Background: Uneven Criticism of Mechanically-Adopted Findings of Fact.*

Despite Second Circuit Judge Jerome Frank's 1942 condemnation of district judge's mechanically "finding" facts filed in the clerk's office and submitted to the judge, *United States v. Forness*, 125 F.2d 928, 942-43 (2d Cir. 1942), the Supreme Court through Mr. Justice Douglas took a more lenient position two years later in *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), and 20 years later on appeal from the District Court of Utah, Willis W. Ritter, Judge, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). Thereafter, judge Ritter was reversed several times by the Tenth Circuit for the same or similar conduct.[54]

The lack of strong condemnation by the Supreme Court led to loose practices in district courts which many circuit courts tried to halt. *Roberts v. Ross*, 344 F.2d 747 (3rd Cir. 1965). The strongest language to date is from *Ramey*

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[50] Act of November 6, 1978, P.L. No. 95-598, Sec. 213, 92 Stat. 2549 (1978).

[51] *Id* Sec. 214 (to be codified as 28 U.S.C. Sec. 455).

[52] Bankruptcy Act Comment to B.R. 505, *Collier Pamphlet Ed., Bankruptcy Act and Rules*, Part 2, 1976, p. 892.

[53] 411 U.S. 911 (1973).

[54] *Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974); *G. M. Leasing Corp. v. United States*, 514 F.2d 935 (10th Cir. 1975). *Cf. United States v. Ritter*, 540 F.2d 459 (10th Cir. 1976); *United States v. Bray*, 546 F.2d 851 (10th Cir. 1976); *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358 (10th Cir. 1977).

Construction Co. v. Apache Tribe of Mescalero Reservation, 616 F.2d 464 (10th Cir. 1980) calling the procedure "*indefensible and almost universally condemned*" [Emphasis added] 616 F.2d at 469 (n7).

Beginning in 1964 the National Conference of Bankruptcy Referees sponsored seminars for newly appointed referees in bankruptcy, modeled after seminars held for newly appointed district judges. One referee wrote at length of the necessity of a referee preparing his own findings and conclusions:

> "It should be remembered that referees in bankruptcy are not supplied with law clerks. . . . . Hence, briefs and requests for findings of fact and conclusions of law should be required of counsel in complicated cases, *not for the purpose of being peremptorily adopted or rejected, but as aids in arriving at one's own.* [Cite]
>
> " . . . I have no difficulty in following *Judge Wright's admonition that the correct adjudicating process cannot take place unless I make findings of fact and conclusions of law of my own.*
>
> "[T]he qualifying standards of [referees'] *right* to be *designated judges* of the court of bankruptcy *derive* from the judicial quality of the conduct of their hearings, and *from their conscientiousness and erudition in the preparing of legal opinions and their findings of fact and conclusions of law.*"

W. Washabaugh, Jr., "Contested and Non-Contested Matters," *Proceedings of Seminars for Newly Appointed Referees in Bankruptcy* (1964) at pp. 253-54, 256. [Emphasis added.]

2. *Ghost-Written Findings of Fact for Referee.*

Under the second sentence of new Canon 3A(4) of the Code of Judicial Conduct [App 193] as well as the first sentence of the second paragraph of old Canon 17 of the Canons of Judicial Ethics [App. 207], a brief of argument presented to the bankruptcy judge by one party cannot be concealed from opposing counsel. Similarly Local Rule 91.8 of the Northern District of Georgia provides that (a) when a district judge announces his ruling in open court, (b) the prevailing party's counsel shall submit a proposed order within two days, and (c) simultaneously send service copy to opposing counsel.

A judge cannot obtain legal advice except upon notice to the parties. The proven and admitted facts in the instant case that the orders and opinions of the bankruptcy judge were the secret work product of ghost-writer Dobbs and editors Cronkright and Pennington clearly violate judicial ethics. *In re Dekle*, 308 So.2d 5 (Fla. 1975); *In re Boyd*, 308 So.2d 13 (Fla. 1975).

3. *Ex Parte Work Sessions.*

Ex parte conferences are highly disfavored under old Canon 17 (first paragraph) and are condemned under new Canon 3A(4) (first sentence). Referees in banruptcy were aware of the condemnation of *ex parte* conferences:

> "All conferences at side-bar or in chambers should be with counsel for all parties in attendance at the same time. *It is a breach of judicial etiquette, indeed of judicial ethics, especially in an adversary situation, to meet or confer with one side only.*"

R. Hiller, "Problems in Judicial Ethics for Referees in Bankruptcy," *Proceedings of Fifth Seminar for Referees in Bankruptcy* (1968) at 7.

Finally from a referee, now bankruptcy judge in and for Northern District of Georgia:

> "*Ex parte* orders are orders signed and filed without notice of hearing to adverse parties. Because of procedural due process requirements of notice, and an opportunity to be heard, it can generally be said that we cannot decide on an *ex parte* basis any matter involving substantial adverse interest or interests."

W. Homer Drake, "Contested Matters & Ex Parte Proceedings," *Proceedings of Fifth Seminar for Newly Appointed Referees in Bankruptcy* (1968) at 252. Rather than prove Aetna's assertion at a court of appeals' rehearing that the instant shenanigans were common practice in the Northern District of Georgia, *a bankruptcy judge of the very district has repudiated it in writing!* Georgia state courts also condemn *ex parte* conferences. *Grizzard v. Davis*, 131 Ga. App. 577, 206 S.E.2d 853 (1974).

Art. III courts have not condemned *ex parte* conferences as they should have. Possibly part of the reason is *Mitchell*

v. Sirica, 502 F.2d 375 (D.C. Cir.) (*en banc*), *cert. denied* 94 SCt 3232 (1974). Regarding the instant case, the first panel of the Fifth Circuit to hear the FRAP 6(a) petition for allowance of appeal observed:

> "The occurrence of *ex parte* conferences . . . alone do not demonstrate collusion." 581 F.2d 520, 521.

The panel cited *Martelli v. City of Sonoma*, 359 F. Supp. 397 (N.D. Cal. 1973), which was decided one month after the Judicial Conference of United States adopted the Code of Judicial Conduct for United States Judges, April, 1973. The subsequent vacating of 581 F.2d 520 may have meant that the panel withdrew the holding.

4. *Social Relations: Herein of Breakfast Meeting*

New Canon 5A [App 199] and new Canon 5C (Financial Activities) (4)(b) [App. 205] were developed from old Canon 33 which was quoted with approbation by the Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 at 149-150 (1968), in disqualifying the third arbitrator for not disclosing a connection to the winning party. Referees have recognized that social relations can be improper:

> "Public social appearances with members of the bar invite attention and misunderstanding. I do not think it necessary to abandon all personal friendships when one becomes a referee, but it is imperative that no attorney gets the impression that in front of you certain attorneys cannot lose. *Eating with an attorney is more questionable than eating with a number of attorneys. Any social appearance with attorneys engaged in litigation before you is a grave error.* *** "I think my conclusions are obvious." [Emphasis added.]

D. Cowans, "Problems of Ethics for Referees," *Proceedings of Second Seminar for Referees in Bankruptcy* (1965) at pp. 20-21, 23.

Without peradventure of doubt breakfast by the referee and trustee on September 20, 1977 immediately before the continued hearing of the 60(b) motion was improper, and highly so.

5. *Misrepresentations of Material Fact.*

The referee was not under oath. Nevertheless new Canons 1 and 2A [App. 192] provide a binding ethical precept: an honorable judiciary. The referee stated on March 6, 1978 that "I don't have breakfast in Atlanta, Georgia with anybody. . . . ", (T65) but the trustee's co-counsel stated in oral argument, April 14, 1980 at a court of appeals' rehearing that the referee and the trustee had breakfasted together September 20, 1977 immediately before a 60(b) hearing. Also, the referee denied that Aetna's lawyer drafted a 40-page opinion in the 60(b) case. Aetna's counsel, R. W. Ide III, stated at the same oral argument, April 14, 1980, that the referee called his firm and asked it to prepare an order-opinion denying the 60(b) motion; and the firm complied. The pernicious effect of these misrepresentations is analyzed in the fee petition.

6. *Intentional Distortions of Fact*

> "One of the worst forms of judicial behavior is the subtle distortion of the facts, just enough that certain rules of law as the referee conceives them will apply."

R. L. Hiller, "Problems of Judicial Ethics for Referees in Bankruptcy," *Proceedings of Fifth Seminar for Referees in Bankruptcy* (1968) at 6. The 40-page opinion written by Aetna's attorney in the 60(b) case and the 37-page similarly-written opinion contains numerous distortions of fact. One is illustrative; others are given in footnote form in Statement of the Case.

The most serious substantive distortion concerns petitioners' basic claim, to wit: Aetna is estopped to deny that it is a receiver of a voidable or fraudulent conveyance from the bankrupt; the estoppel is an equitable estoppel; and it works on Aetna's receipt whether or not under an otherwise duly perfected security interest under *Ga. Code Ann.* Section 109A-9—101 et seq., and any underlying indebtedness. The equitable estoppel is invoked as a matter of law because of Aetna's bad faith toward the bankrupt. The bad faith conduct takes two forms: One type of conduct is reneging on a promise to transmit that portion ($26,000) of a third party check ($60,560) representing fire insur-

ance proceeds upon equipment owned by Roberts which had been employed in the cash-intensive operation at Forest Park.

A second type of bad faith conduct was requiring Forest Park to sign a new set of loan documents dated January 7, 1974, which purportedly granted to Aetna a security interest in Forest Park's equipment when that equipment (a) was not owned by Forest Park but by Roberts, (b) had been previously (December 31, 1973) destroyed by fire, all of which was known to Aetna, which intended to use the purported security interest to justify its secretly conceived plan not in fact to transmit fire insurance proceeds regarding the equipment to the bankrupt (for re-transmission to Roberts) as Aetna said it would. The impact of both acts of bad faith fell on the bankrupt rendering it hopelessly insolvent. It is not essential that the loan be to Paneling.

In the 60(b) opinion, Aetna wrote for the bankruptcy judge that petitioners had sought damages from Aetna for its lack of good faith, that *Ga. Code Ann.* 109A-1-103 was directory, not mandatory, and did not create a cause of action for bad faith. The estoppel argument was not mentioned nor was *Central Soya Co., Inc. v. Bundrick,* 137 Ga. App. 63, 222 S.E.2d 852 (1975). That the bankruptcy judge and Aetna were aware of petitioners' real argument not only appears from the September 19, and 20, 1977 hearing transcripts and petitioners' brief filed October 11, 1977 pursuant to direction, but the argument had been made to the district judge in *Pennington v. Aetna in defense to Aetna's motion for summary judgment.* See Order, March 30, 1978, denying Aetna a summary judgment. App. 142.

7. *Assistance to Aetna to Assure Victory on $600,000.00 Counterclaim in Plenary Action.*

As reprehensible as the referee's actions to cause a $36,000 transfer payment from petitioners to respondents, is the effort to cause ultimately a $600,000 transfer payment from petitioners to Aetna. A *comparsion* of Aetna's counterclaim filed October 25, 1977 *with* Aetna's lawyer's 40-page bankruptcy opinion shows that the latter helps to establish by the doctrine of stare decisis, if not collateral estoppel or merger and bar (i.e. res judicata), the material contentions of the counterclaim. A plainer case of fraud, on both courts and petitioners, is hard to imagine.

E. Irrelevance of Petitioners' Missteps to Exercise of Supervisory Powers

> " . . . [T]he supervisory power . . . is applied in part to protect the integrity of the *court* rather than to vindicate the constitutional rights of the defendant. . . ."

United States v. Payner, ___U.S. ___, 48 U.S.L.W. 4829 at 4832 (n8) (1980). Petitioners' constitutional right is to an impartial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927); *Chapman v. California*, 386 U.S. 18 (1966) (dictum).

Where impairment of one's constitutional rights permits a due exercise of supervisory power, *United States v. Payner, supra*, the power is directed to eradicating the illegal conduct which impairs the integrity of the federal court. Beneficial impact on one's constitutional rights is incidental. In the same vein petitioners' alleged missteps in the instant case are irrelevant to the Court's exercise of supervisory power since petitioners have not engaged in illegal conduct.

F. Extent of Remedies

This Court has ruled similar conduct voids previous proceedings. *Ensminger v. Powers*, 108 U.S. (11 Wall) 292 (1883); *Hazel-Atlas Co. v. Hartford Empire Co.*, 322 U.S. 238 (1943); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946).

VIII. FEDERALISM AND COMITY REQUIRE FEDERAL COURTS TO ADOPT ETHICAL PRECEPTS ESTABLISHED BY STATE COURTS FOR STATE JUDGES, AT LEAST IN JUDICIAL CIRCUITS IN WHICH SAID STATES LIE.

A. Introduction.

Nothing in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) or *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), indicates that the findings and conclusions at issue were submitted to the trial judges *ex parte*. By contrast, Florida state courts seemingly will not allow a state judge mechanically to adopt party-prepared findings and conclusions whether or not submitted *ex*

parte. In re Dekle, 308 So.2d 5 (Fla. 1975); *In re Boyd*, 308 So.2d 13 (Fla. 1975). United States judges and Florida judges, alike, are bound to follow an identical Code of Judicial Conduct. A conflict thus appears between judicial enforcement of the ethical precepts in the federal judiciary and in the State of Florida. The precepts of the State of Georgia would appear to be nearly as stringent as Florida's. *Infra*.

B. **Hypothesis.**

Quaere: a federal district judge in Florida should rule that a Florida civil rights statute, sponsored by the Florida governor and his majority political party, violated the Equal Protection Clause of the Fourteenth Amendment. Assume further that the district judge's opinion was entered after a jury verdict consistent with the position taken by the governor, causing the jury verdict to be set aside. Take as given that the opinion was written by an individual whose civil rights were affected by the Florida statute, or by his attorney. Now suppose that the true authorship of the opinion should be disseminated to the public by the mass media.

C. **Federalism and Comity.**

It would be an understatement to say there would be public agitation. Citizens of Florida and their duly elected officials would cry "foul," for their own state judges would be removed from office for such conduct. *Cf. In re Dekle, supra*, and *In re Boyd, supra*. Georgia citizens, after noting that a referee in bankruptcy is subject to its Code, 231 Ga. A-14 (1973), would do likewise. *Cf. In re Broome*, 245 Ga. 227, ___ SE2d ___, (1980); *Gray v. Barlow*, 241 Ga. 347, 245 SE2d 229 (1978); *Smith v. State*, 239 Ga. 477, 238 SE2d 30 (1977).

Discord and disharmony have been studiously avoided by all federal officials since the founding of the republic, with exception for civil war and misguided federal judicial doctrine. On the latter subject, the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842), was first ameliorated by a doctrine of comity, *Mutual Life Ins. Co. v. Johnson*, 293 U.S. 335 (1934), and then repudiated by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Today, in diversity actions

the substantive law is state law. In federal question cases, state law is the substantive law unless the *issue* is governed by federal statute or an intent has been expressed by Congress to preempt the field.

On the subject of adjectival law, the Conformity Act of 1872 was followed in actions at law until 1938 when the Federal Rules of Civil Procedure were approved pursuant to the Rules Enabling Act. Since *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), the question has been whether a federal rule violates the Rules Enabling Act by affecting the substantive rights of the aggrieved. It is now clear, however, that a federal court is to follow a federal rule even if it will produce a different outcome than following a state procedural rule, so long as the federal interest outweights the state's interest. *Hannah v. Plumer*, 380 U.S. 460 (1965).

Petitioners' research has not uncovered any case assessing a federal judge's behavior under state law, although Georgia's Code of Judicial Conduct (as others adopted without change from the original) purports to do so. 231 Ga. A-13. Dictum in *Nudd v. Burrows*, 91 U.S. 426 (1875), states that "[t]he personal conduct and administration of the judge in the discharge of his separate function" is outside the Conformity Act of 1872. Yet the case concerned the propriety of a trial judge's comments to the jury about the weight of the evidence, and not acts of dishonor.

D. **Good Behavior.**

Art. III, Section 1 provides that "judges . . . shall hold their offices during good behavior. . . .", but the expression is not defined. Nor is it defined in Art. I, Section 3, pertaining to impeachment, the method by which judges (as well as presidents) are removed from office for bad behavior. *The Federalist*, No. 78 (Hamilton) suggests that lack of arbitrariness (p. 510) and adherence to "truth and propriety" (p. 507), "integrity" (p. 511), "fit character" (p. 511) and "dignity" (p. 511) are components of "good behavior." *The Federalist*, No. 79 contemplates that federal judges will "behave properly." (p. 513).

One reason federal judges were given life tenure for good behavior was the perceived inadequacy of State judges. Hamilton in urging that Congress should establish inferior federal courts rather than rely on state courts to adjudge "causes arising out of the national constitution" might be

saying at p. 528 that a state judge's bending to "a local spirit" in matters of national importance is a form of behavior to be guarded against – "bad behavior" if you will. However, what may be involved in the instant case is a federal judge who is subject to "a local spirit." In Florida, the State judges are required to exercise independence to a much higher degree than Federal judges. This is the reverse of the danger perceived by Hamilton.

A comparison of *Federalist* No. 65 pertaining to the nature of impeachment under Art. I with *Federalist* No. 78 pertaining to Art. III judges suggests that *"high character"* is expected of federal judges but not necessarily other government officials. Should this expectation be different if the Art. I official is a judicial officer, as a magistrate, a referee in bankruptcy or a bankruptcy judge? The answer is, Negative, because the standard for removing a referee at the critical dates involved was "incompetency, misconduct, or neglect of duty" (Sec. 34, Act of 1898) which might be a higher standard than good behavior. For example, the *Federalist* No. 79 opposed a provision to remove federal judges for "inability;" arguably a federal judge cannot be removed for incompetency. It is not apparent that every "neglect of duty" is bad behavior. Since referee's findings of fact are accorded the clearly erroneous rule, they should be held to the same ethical precepts as Art. III judges.

E. **Conclusion of Interests Analysis.**

Most federal judges are lawyers first licensed by the states in which they reside. They would be presumed to have grown up with the Canons of Legal Ethics and/or the Code of Professional Responsibility regarding the public role of counsel. They would also be familiar with the Canons of Judicial Ethics and/or the Code of Judicial Conduct. While some of their brother lawyers became state court judges, they were appointed federal judges. This turn of events should not permit the latter to uphold the Supreme Law of the Land with a more casual, ethical attitude than brother state judges. Since state judges adjudge causes arising under the federal judicial power, they should have standards no lower than federal judges. Where ethical standards are higher, the federal judges should be held to those higher standards so that the

supremacy of federal law will be anchored in superior ethics as well as superior national importance. The nation does not need or deserve the strain posited by the hypothetical and posed by the wrong interpretation of the instant case.

IX. PROCEEDING BEFORE BANKRUPTCY JUDGE WHOSE IMPARTIALITY MIGHT REASONABLY BE QUESTIONED DEPRIVED PETITIONERS OF FIFTH AMENDMENT DUE PROCESS AND WAS VIOLATION OF 28 U.S.C.A. SEC. 455

A. Type of Constitutional Deprivation

1. *Lack of Impartial Tribunal.*

The Supreme Court has stated in dictum that — "[O]ur prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . ."
— at which point a footnote cites to: "*Tumey v. Ohio,* 273 U.S. 510 (impartial judge)." *Chapman v. California,* 386 U.S. 18 at 23 and n8 (1966). Another indication of the indispensable requirement of an impartial decisionmaker is *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145 (1968), which reversed a First Circuit affirmance of an arbitration award on the ground that a pecuniary interest of a third arbitrator, chosen by each litigant's arbitrator, invalidated the proceedings, quoting old Canon 33 of the Canons of Judicial Ethics.

The issue is whether petitioners are required under *Tumey v. Ohio, supra,* to establish that the bankruptcy judge is actually partial. The answer is, No, because partiality bespeaks judgment governed by bias or prejudice. *Tumey v. Ohio* merely involved a state justice of the peace whose compensation would be affected in small degree by the judgment he would render in respect of Tumey. No bias or prejudice was alleged or proven. Although no pecuniary interest can be proven, petitioners' proof of other facts – taken in connection with admisssions *in judico* – should suffice to establish mandatory disqualification. *Rapp v. Van Dusen,* 350 F.2d 806 (3rd Cir. 1965). *Cf. Ward v. Village of Monroeville,* 409 U.S. 57 (1972); *In re Murchison,* 349 U.S. 133 (1955). See, generally, Comment, *Disqualifi-*

cation for Interest of Lower Federal Court Judges: 28 USC Sec. 455, 71 Mich. L. Rev. 538 (Jan. 1975).

2. *Lack of Fair Notice.*

Roadway Express, Inc. v. Piper, _____ US _____, 48 USLW 4836 (1980), establishes that attorneys' fees may be awarded by an Art. III court against a litigant or his attorney and states:

> "Like other sanctions, attorneys' fees certainly should not be assessed lightly or *without fair notice* and an opportunity for a hearing on the record." 48 USLW at 4840. [Emphasis added].

Petitioners' attorney did not receive fair notice because (a) no motion was filed to seek an award against him personally, (b) an oral motion by Aetna to seek award against him personally was orally withdrawn in the same hearing in which made, (c) the bankruptcy judge at the end of the same hearing announced orally his decision to award some amount of attorneys' fees against petitioners but said "certainly" that petitioners' counsel was not included. Thus petitioners' counsel had no opportunity to hire his own counsel or timely to advise corporate petitioners of the wisdom of their hiring other counsel or co-counsel.

Moreover, petitioners as a group did not receive fair notice of the large amount sought against them prior to commencement of the proceedings. The first day of hearing was September 19, 1977. The second day of hearing was February 14, 1978 when the bankruptcy judge announced his decision to hold them liable. After the second day and before the third day of hearing, March 6, 1978, time slips were furnished which when combined with motion papers indicated the sum was close to $40,000.00. Petitioners could not request a jury trial, a discretionary right in bankruptcy.

B. **Jury Trial Right**

Petitioners seek a jury trial "to guard against bias or mistake." *Muniz v. Hoffman,* 45 L.ed.2d at 335-336 (1977). Jury trial in bankruptcy under the Act of 1898 was not unknown. Petitioners' request this Court to extend this right under the Fifth Amendment, even if it should not rule the judge disqualified. That the process due requires a jury trial is reached upon an analysis suggested in *Mathews v. Eldridge,* 424 U.S. 319 (1975).

X. CONCLUSION

As a captain of a ship, or a teacher in a classroom, a judge sets the moral tenor for his courtroom. Default of leadership encourages discord, occasionally misbehavior.

For 190 years this Court has exercised the judicial power of the United States on the highest ethical plane. The Court, and the Nation, have survived judicial decisions altering fundamental aspects of everyday life. Without an enforcement arm of its own, the Court has enjoyed compliance with its decisions, often voluntary, assuring a Rule of Law throughout the land.

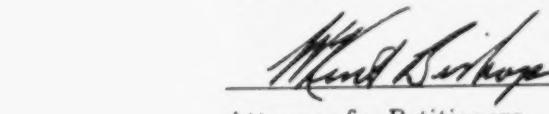
The instant case is not so much distasteful as opportunity to express the Court's view of judicial ethics; inculcation by example has not met with complete success as evidenced by 1974 legislation, recent bills and increasing numbers of such cases coming to the Court.

As corporate citizens, petitioners are somewhat unwitting actors in this drama. They question the expenditure of large sums to vindicate basically a problem of the public weal; but they, too, realize that corporate citizenship has its obligations. Perhaps the coincidence of corporate involvement has made possible the presentation of these petitions.

Petitioners urge the Court to grant the writ to vindicate the integrity of federal courts from the ambiguities of the written word. As with those published decisions, so too with this Court: "The sentence of today will make the right or wrong of tomorrow." B. Cardozo, *The Nature of the Judicial Process* (1921) at 21.

Respectfully submitted,

WINFORD KENT BISHOP



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XI. CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Petitioners' Joint Appendix upon each respondent by depositing same in the United States Mail, sufficient postage prepaid, properly addressed to counsel at their last known addresses.

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This 2 day of September, 1980.

W. Kent Bishop